No. 01-18-00930-CR

IN THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT
OF TEXAS, AT HOUSTON

Kyle Dean Kuykendall
Appellant

v.

The State of Texas
Appellee

On Appeal from the 198th District Court of Kerr County in Cause No. B15-684; the Honorable M. Rex Emerson, Judge Presiding

State's Brief

Submitted by:

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Oral Argument Not Requested

Identity of Parties and Counsel

Pursuant to the Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

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Statement of the Case

The following is a brief general statement of the nature of the cause or offense:

Appellant adequately sets out the nature of the case.

Issues Presented in Appellant's Brief

The following are the points upon Appellant has predicated his appeal:

1. **Appellant's convictions violate the double jeopardy clause because Appellant was convicted of failure to appear on two cases that were set for the same day in the same court that were the subject of the same two-count indictment.**

2. **The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.**

Statement Regarding Oral Argument

The State believes the case presents only a legal question. Thus, oral argument is unnecessary and oral argument is not requested.

Note Regarding Abbreviations & Hyperlinks

In this brief, the State refers to the Clerk's Record as "CR" followed by the appropriate page: e.g., "(CR 123);" and the Reporter's Record as "RR" followed by the volume, page and line numbers: e.g., "(RR Vol. 3, P. 47, L. 12-15). Additionally, in this brief, the State utilizes hyperlinks to cited opinions. Where practical, the hyperlink will be to the posted opinion on the particular court's website. All other hyperlinks are to a copy of the opinion on the Google Scholar site.

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State's Brief

TO THE HONORABLE FOURTH COURT OF APPEALS:

COMES NOW, the State of Texas, Appellee in the above styled and numbered cause, by and through her duly elected District Attorney, and respectfully files the State's Brief, and would show the Court as follows:

Statement of Facts

Appellant adequately sets out the relevant facts.

Appellant's Point of Error One Restated

Appellant's convictions violate the double jeopardy clause because Appellant was convicted of failure to appear on two cases that were set for the same day in the same court that were the subject of the same two-count indictment.

The State's Counter Point

There is no Double Jeopardy Violation Present.

Summary of the State's Argument - Counter Point One

When a defendant is released because of the posting of more than one bond, his failure to appear constitutes the offense of failure to appear as to each bond and, therefore, the entry of convictions as to each bond does not violate the Double Jeopardy Clause. Moreover, Appellant cannot demonstrate any level of harm.

Argument & Authorities - Counter Point One

Appellant's brief acknowledges that the primary question (how many failure to appear convictions can be entered when a defendant fails to appear one time?) has never been answered. He has, nevertheless, based his argument on the concurring and dissenting opinions of Judge Richardson and (retired) Judge Johnson in a Court of Criminal Appeals case, ***Ex parte Marascio***, 471 S.W.3d

832 (Tex.Cr.App. 2015),[1] and makes the argument that the second failure to appear conviction violates Double Jeopardy. The case does not, however, support his argument.

In ***Marascio***, the defendant was charged, in three separate indictments, with felony Bail Jumping and Failure to Appear. He was convicted in each case, sentenced to eight years' imprisonment for each charge (to run concurrently), and did not appeal. In a subsequent *habeas corpus* proceeding, he argued that the multiple convictions violated the constitutional prohibition against double jeopardy. The Court of Criminal Appeals filed and set the applications to determine "several issues associated with Appellant's double-jeopardy claims." Ultimately, the Court did not answer those questions, simply concluding in a published *per curiam* opinion that the defendant "is not entitled to relief."

Appellant's brief correctly asserts that "*Marascio is a conglomeration of concurring and dissenting opinions . . ..*" Appellant's brief also correctly asserts that the plurality opinion offers "no binding precedent." There is certainly no

[1] In should be noted that, when Appellant initially cites ***Marascio*** on page 11 of his brief, he does so in a fashion which would indicate a citation to the Opinion of the Court. This is misleading, as all citations to ***Marascio*** on page 11 cited to statements in Judge Richardson's concurring opinion, in which only Judge Newell joined.

opinion on the issue which the Court of Appeals is bound to follow, and ***Marascio*** does not support Appellant's claim.

Moreover, the Legislature's choice of words in the statute indicates that the existence of a bail bond is part of the gravamen of the offense. Additionally, reaching a different construction would lead to absurd results.

In construing a statute, this Court first examines the literal text. ***Boykin v. State***, 818 S.W.2d 782, 785 (Tex.Cr.App. 1991). The words and phrases are read in context and construed according to the rules of grammar and usage. ***Jones v. State***, 323 S.W.3d 885, 888 (Tex.Cr.App. 2010). Only if the language is ambiguous or leads to absurd results can this Court consult extra-textual sources of information. ***Jones***, 323 S.W.3d at 888.

At issue in this case is the allowable unit of prosecution, or gravamen, for the offense of failure to appear or bail jumping. Penal Code § 38.10(a) provides that it is an offense if a person "intentionally or knowingly fails to appear in accordance with the terms of his release." In his argument, that Double Jeopardy is violated because there were "two cases that were set for the same day in the same court," in essence argues that the failure to appear is the gravamen of the offense.

This construction would render superfluous the requirement in Penal Code § 38.10(a), that the failure to appear be "in accordance with the terms of his release." Courts must construe a statute as written by the Legislature and cannot add to or delete from the Legislature's words. See, e.g., ***Martin v. State***, 896 S.W.2d 336, 338 (Tex.App. - Amarillo 1995); ***Leonard v. State***, 767 S.W.2d 171, 176 (Tex.App. - Dallas 1988), aff'd sub. nom., ***Schalk v. State***, 823 S.W.2d 633 (Tex.Cr.App. 1991). If the Legislature did not intend that the release instrument matter in the offense, then the section need only have been entitled "Failure to Appear" and need not have included language regarding the terms of the release.

Indeed, some jurisdictions have enacted statutes that would penalize Appellant's conduct as a single offense without reference to the bond. See ***Lennon v. United States***, 736 A.2d 208, 210 (D.C. 1999)(holding that a single failure to appear in multiple cases was one offense where statute did not reference bond); ***McGee v. State***, 438 So.2d 127, 131 (Fla. Dist. Ct. App. 1983)(holding single instance of conduct represented single crime where statute penalized a person who "having been released pursuant to chapter 903, willfully fails to appear before any court or judicial officer as required").

At least one jurisdiction has enacted a statute that does not reference the terms of a bond but allows multiple prosecutions based on a single violation involving multiple pending cases. See ***People v. Albarran***, 352 N.E.2d 379, 382 (Ill. App. Ct. 1976)(allowing multiple convictions for a single act in violation of a statute penalizing persons "having been admitted to bail for appearance before any court of record . . ., incurs a forfeiture of the bail and willfully fails to surrender himself within 30 days following the date of such forfeiture . . .."). Other jurisdictions whose statutes more closely resemble Section 38.10 would treat Appellant's situation as multiple offenses. See, e.g., ***State v. Richter***, 525 N.W.2d 168, 169-170 & n.2 (Wis. Ct. App. 1994)(finding single act violating three different bonds constituted three different offenses of statute penalizing "[w]hoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond . . ."); ***State v. Garvin***, 699 A.2d 921, 925-927 (Conn. 1997)(finding single failure to appear on multiple bonds constituted multiple offenses of statute penalizing a person for "failure to appear in the first degree when, while charged with the commission of a felony and while out on bail or released under other procedure of law, he willfully fails to

appear when legally called according to the terms of his bail bond or promise to appear.").

Only Oklahoma appears to construe a statute similar to Section 38.10 to prohibit multiple prosecutions based on a single violation of multiple bonds. See ***Bristow v. State***, 905 P.2d 815, 816-817 (Okla.Cr.App. 1995)(single failure to appear involving multiple underlying cases was a single violation of statute penalizing one who "having been admitted to bail or released on recognizance, bond, or undertaking for appearance before any magistrate or court of the State of Oklahoma, incurs a forfeiture of the bail or violates such undertaking or recognizance and willfully fails to surrender himself within five (5) days . . .").

Thus, of three statutes roughly similar to Section 38.10, two are construed such that the underlying bond is part of the gravamen of the offense or unit of prosecution. Additionally, of the six jurisdictions identified as having addressed the issue, half have identified the gravamen as linked to the underlying offense such that a single failure to appear supports multiple charges. Moreover, the Court of Criminal Appeals has previously recognized that a single act can support multiple criminal convictions. See ***Watson v. State***, 900 S.W.2d 60, 61-62

(Tex.Cr.App. 1995)(single act of possession of two controlled substances in same penalty group supported two criminal convictions).

As of this writing, it does not appear that any Texas court has addressed this specific issue. The Fifth Court of Appeals has stated that the gravamen of the offense is the failure to appear, but that ruling was in the context of a claim that prosecution for bail jumping after dismissal of the underlying felony violated Due Process and did not consider the instant argument. See ***Small v. State***, 692 S.W.2d 536, 540 (Tex.App. - Dallas 1985). The Ninth Court of Appeals addressed a case involving multiple indictments for bail jumping based on a single missed appearance, but that court disposed of the case on other grounds and it does not appear that a Double Jeopardy claim was raised. See ***Doucette v. State***, 774 S.W.2d 88, 88-90 (Tex.App. - Beaumont 1989).

Penalizing the violation of a bond rather than the singular failure to appear provides a more direct relationship between the harm and the penalty. After all, if a defendant fails to appear on two bonds, the surety forfeits the principal in each bond, as was the case here.[2] If the Court reads the bond out of the offense,

[2] See supplemental Clerk's Record, filed August 2, 2019.

it would decrease the utility of the offense as a deterrent by making it more likely that offenders like Appellant who faced multiple charges will flee.

The Legislature gave no indication it intended such a reading of the statute. Indeed, by focusing in two separate subsections on failure to appear "in accordance with the terms of his release," the Legislature indicated that its focus was on the violation of the terms rather than the failure to appear in isolation. The violation of the terms of release is the gravamen of the offense, and thus Appellant's two convictions for violating two separate bonds, by his failure to appear in court to answer charges as to two separate indictment counts, do not violate Double Jeopardy.

Harm Analysis

It is not clear that the claimed error is subject to a harm analysis. In ***Ex parte Parrott***, 396 S.W.3d 531 (Tex.Cr.App. 2013), the Court of Criminal Appeals seemed to have imposed a harm analysis on any claim that a sentence was illegal, including Double Jeopardy violations. It also appears that the Court may have subsequently moved away from that position in ***Ex parte Denton***, 399 S.W.3d 540 (Tex.Cr.App. 2013).[3] Presuming that the Court of Criminal Appeals

[3] Judge Meyers' dissenting opinions in both ***Parrott*** and ***Denton*** set out and explain the conundrum.

will ultimately determine that any illegal claim will require a showing of harm, the State asserts that Appellant cannot demonstrate harm.

The sentences in the instant cases were Ordered to be served concurrently and both began on the same day, August 1, 2018 (CR 21-25). Thus, Appellant will serve the same sentence as if the second conviction had never been entered. He has not been in any way harmed by the entry of the second conviction.

Conclusion - Counter Point One

The gravamen of "failure to appear" under Penal Code § 38.10(a) is linked to the underlying offense and the bond in that particular case by which release was obtained, not simply to the failure to appear. Appellant had been released pursuant to two separate surety bonds and failed to satisfy his promise to appear on two separate charges. His conviction for failing to appear on each of those two separate bonds and charges does not violate his rights under the Double Jeopardy Clause. Moreover, to the extent there is a technical violation of the Double Jeopardy Clause, Appellant has suffered no harm. The instant convictions should be affirmed.

Appellant's Point of Error Two Restated

The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.

The State's Counter Point

Appellant is entitled to the Requested Relief.

Argument & Authorities - Counter Point Two

As per the District Attorney's letter to the Clerk of the Court dated March 12, 2019, the State "agrees with Appellant's lawyer regarding the attorney's fees." A defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees of legal services provided. ***Armstrong v. State***, 340 S.W.3d 759, 765-766 (Tex.Cr.App. 2011); ***Mayer v. State***, 309 S.W.3d 552, 556 (Tex.Cr.App. 2010). Appellant correctly asserts that the evidence is insufficient to support the trial court's order assessing attorneys' fees against him. Thus, the assessment of attorney fees was erroneous and should be removed. ***Cates v. State***, 402 S.W.3d 250, 252 (Tex.Cr.App. 2013); ***Mayer***, 309 S.W.3d at 556. The Judgment should be reformed as requested.

Prayer

WHEREFORE, PREMISES CONSIDERED, the undersigned, on behalf of the State of Texas, respectfully prays that this Honorable Court will review this brief and upon submission of the case to the Court will affirm the judgment and conviction of the court below.

Respectfully submitted,

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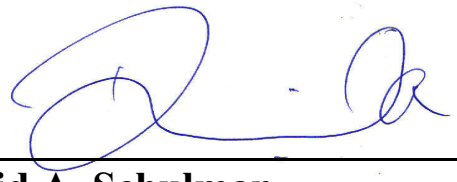
Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X9 software, contains 2008 words, excluding those items permitted by Rule 9.4 (i)(2)(B), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) on August 22, 2019, a true and correct copy of the above and foregoing "State's Brief" was transmitted via the eService function on the State's eFiling portal, to Patrick Maguire (mpmlaw@ktc.com), counsel of record for Appellant.



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